FILE COPY

IN THE

Supreme Court of the United States

October Term, 1958.

No. 876

HELMS BAKERIES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit.

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Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 3, 1959.

Opinions Below.

A first decision of the Tax Court, including findings of fact and opinion, is reported at 23 T. C. 967. An opinion thereafter rendered by the Court of Appeals in accepting jurisdiction and remanding the case to the Tax Court is reported at 236 F. 2d 3 and annexed hereto as Appendix A. The decision and opinion of the Tax Court after such remand are reported at 17 TCM 346. On the appeal from that decision the Court of Appeals overruled its prior decision and dismissed the appeal for lack of jurisdiction. This second opinion of the Court of Appeals is as yet unreported and is annexed hereto as Appendix B.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 3, 1959 and is annexed hereto as Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1254, made applicable by I. R. C. 1954, sec. 7482(a).

Questions Presented.

1. Whether, after holding that the Tax Court, an administrative agency, had deprived petitioner of its property without due process of law by arbitrarily making findings unsupported by evidence and contrary to the evidence, and by failing to make essential findings required by law, the Court of Appeals erred in holding that it nevertheless lacked jurisdiction to review such unlawful action of the Tax Court by reason of the review-limiting provisions of Section 732(c) of the Internal Revenue Code of 1939.

2. Whether the construction and application of Section 732(c) of the Internal Revenue Code of 1939 by the Court of Appeals are contrary to the law and Congressional intent, deprive petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution, and violate the judicial power provisions of Article III of the Constitution as well as the supremacy clause embodied in Article VI of the Constitution.

3. Whether, after the ruling that it had jurisdiction to review the arbitrary and unconstitutional action of the Tax Court had become final, the Court of Appeals then had the power after remand and a second appeal in the same case on the same grounds to overrule its prior judgment and decline jurisdiction to review.

Statutes Involved.

The pertinent statutory provisions are printed in Appendix D annexed hereto.

Statement.

In the Tax Court, an administrative agency[1], petitioner sought excess profits tax relief for the years 1940-1945 under I. R. C. 1939, section 722. The income which was subject to that tax was the income in excess of normal earnings, and normal earnings were represented by a credit called the "excess profits credit," measured by the average income of the years 1936-1939, known as the "base period." The average income of that period, entitled the "average base period net income," was determined generally under some provision of Section 713, in the case of petitioner under section 713(f). If a taxpayer, however, could establish a higher figure under section 722, which gave effect to specified economic factors, it could use instead that higher figure, known as the "constructive average base period net income." This was the relief allowed under section 722.

Under 722(b)(1) to (5) grounds for relief were specified and a taxpayer could use one or more of them so as to achieve the highest possible composite result.[2] Petitioner put in evidence, and the Tax Court made findings, under

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[1]The Tax Court is an independent agency in the executive branch of the government. (I. R. C. 1954, sec. 7441; I. R. C. 1939, sec. 1100.) It is not a court at all but merely an administrative agency. *Lasky v. Commissioner*, 352 U. S. 1027, affirming *per curiam* 235 F. 2d 97.

[2]House Ways and Means Committee Report 1942-2 C. B. 372, 477; Senate Finance Committee Report, 1942-2 C. B. 504, 649; Treas. Regs. 112; Sec. 35.722-3; *Boonton Molding Co. v. Commissioner*, 24 T. C. 1065, 1085, footnote.

722(b)(2) and 722(b)(4). The Tax Court decided, however, that petitioner was not entitled to relief, and petitioner appealed. On such an appeal, because of I. R. C. 1939, section 732(c), review could not be had of the Tax Court's determination of any question which involved solely section 722.[3]

In the Court of Appeals, however, petitioner contended that the Tax Court's decision was arbitrary and contrary to its own findings; that it had failed to make certain necessary findings required by law—all in violation of the procedural due process provision of the Constitution. In respect to section 722(b)(2) the Court of Appeals held that it was without jurisdiction because of section 732(c). In respect to section 722(b)(4) it concluded that the Tax Court's ultimate finding was arbitrary and contrary to its own evidentiary findings, and also, on one phase of section 722(b)(4), capacity for operation, that it had failed to make a necessary finding, thus upholding petitioner's claims of due process violations. For that reason the Court of Appeals held that it did have jurisdiciton in respect to section 722(b)(4), despite section 732(c), and therefore remanded the cause to the Tax Court for further consideration in the light of its opinion.

The Tax Court again denied any relief to petitioner, and petitioner again appealed. On the second appeal peti-

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[3]The several courts of appeals of the United States, have been authorized generally to review decisions of the Tax Court, formerly known as the Board of Tax Appeals. (I. R. C. 1954, sec. 7482(a); I. R. C. 1939, sec. 1141(a).) By section 732(c) of I. R. C. 1939 there was excluded from this general power of courts of appeals to review decisions of the Tax Court "the determination of any question" which is necessary solely by reason of section 722.

tioner contended (1) that the Tax Court was now even more arbitrary than before, (2) that it failed to conform to the opinion and mandate of the Court of Appeals, (3) that it failed to make the finding which the Court of Appeals directed it to make, (4) that it merely restated in different language the same conclusion which the Court of Appeals had held arbitrary on the first appeal, (5) that it compounded its error by balancing sections 722(b)(2) and 722(b)(4) separately against section 713(f), instead of taking section 722 as a whole, as reason and the court's own prior holdings required, (6) that it rejected as "unsuitable," and without suggestion of any alternative, a method of computation proposed by petitioner which is the only method the Commissioner and the Tax Court have applied in other cases of the same type, and (7) that the "determination" thus made by the Tax Court was again without due process of law.

On appeal from that opinion, nevertheless, the Court of Appeals concluded that it had previously erred in that, because of section 732(c), it had no jurisdiction, and therefore overruled its decision on the first appeal. It made no attempt, as it could not, to hold that the Tax Court had obeyed the mandate issued to it and corrected its errors. The Court of Appeals held strictly that it had no jurisdiction, that its decision on the first appeal that it did have jurisdiction was erroneous, and that that decision was not binding as the law of the case.

It is in that posture of the case that we come before this Court.

Reasons For Granting the Writ.

1. Clearly, the questions presented are of substantial importance in both the administration of the federal tax laws and the exercise of judicial review with respect thereto.

The holding of the court below that it lacked jurisdiction to review the action of administrative officials taken in excess of their statutory authority and in violation of constitutional limitations appears to be in conflict with applicable decisions of this Court. Moreover, in holding that the provisions of the statute (26 U. S. C., 1952 ed., Section 732(c)) preclude review of agency action taken in violation of the procedural due process provisions of the Constitution, the court below appears to have ruled contrary to Congressional intent and created doubts as to the extent of judicial reviewability in all similarly worded statutes. Whether, in the case of persons who have been permanently deprived of their property by the arbitrary and capricious actions of administrative officials, the denial of judicial process is a denial of due process is an important question of federal law which, it is respectfully submitted, should be decided by this Court.

In the discussion which follows, the importance of the questions presented is illustrated in detail. Appellant discusses first the nature of the claims which the court below refused to review. They will be found to be clear violations of procedural due process by the agency. Essentially the court below was not being asked to review the merits of the results reached by the Tax Court, but the arbitrary and capricious, indeed totally unconstitutional, procedure that the Tax Court employed in reaching the result which it did. Nearly all the requirements of fairness derived from the Constitution were ignored by the agency. It

was solely this area of administrative action on which review was sought. The court below recognized that substantial claims of "due process" violations were involved (App. A, pp. 8, 9-11; App. B, p. 15).

Appellant discusses thereafter the Congressional purpose and intent in the passage of the aforesaid section 732(c). Nothing in the language of the statute, or its legislative history, suggests that Congress intended to withdraw from the courts jurisdiction to review acts of the administrative agency in excess of constitutional or statutory authority. Indeed, the legislative history indicates a narrow area of nonreviewability, leaving all issues *independent* of the abnormality provisions of the Excess Profits Tax law subject to review by the courts. Clearly, the determination of the constitutional issues raised in the court below were not necessary "solely by reason of" section 722.

Since Congress made no express attempt to limit judicial review of unconstitutional action, this Court will not presume that Congress intended such a result, it is respectfully submitted. As we demonstrate hereafter, if such intent to preclude judicial review can be presumed, then the case herein bristles with grave constitutional questions which only this Court can decide. The inherent authority of the judiciary to determine the constitutionality of the exercise of power by administrative authorities, the enforcement of constitutional rights, the preservation of the doctrine of separation of powers, the duties of the courts to exercise judicial powers under the Constitution, the requirements of due process of law—all of these issues would impinge adversely upon any claim that Congress may deprive the courts of jurisdiction to review the unconstitutional acts of an agency in the executive department of government.

Thus, the case herein presents questions of fundamental importance for the administration of statutory policy affecting many administrative agencies, including the Tax Court, and the liberties and properties of all persons swept within the ambit of such enactments.

2. The posture of the proceedings herein is such as to leave no doubt that the questions upon which petitioner sought judicial review were concerned with violations of the Constitution.

The first opinion of the court below conceded that the issue was "whether the Tax Court denied petitioner due process of law" (App. A, p. 4). The court found a failure of due process in two basic aspects; the first, that the ultimate finding of the agency was without any evidentiary support, and indeed, "arbitrary and contrary to its own findings;" the second, that a necessary finding required by the law had not been made by the agency, despite the existence of all the evidence necessary to make such a finding (App. A, pp. 11, 12).[4]

That the aforesaid claims raise essential questions of procedural due process violations has often been decided. An administrative finding not supported by evidence, or clearly contrary to the evidence, is both arbitrary and unauthorized under the Constitution and the law.

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[4]It should be noted that respondent made no attempt to obtain review here of the initial judgment of the court below. On remand, as has been stated, similar due process violations were committed by the Tax Court of even more extensive character, but review by the court below was foreclosed by its second decision that it had erred originally and lacked all jurisdiction to review (App. B, p. 17). That the case involves claims solely of substantial violations of procedural due process is thus clear on the record herein.

"A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred."

Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 277.

"An order based upon a finding made without evidence, The Chicago Junction case, 264 U. S. 258, 263, or upon a finding made upon evidence which clearly does not support it, Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 547, is an arbitrary act against which courts afford relief. The error under discussion was of this character. *It was a denial of due process*" (emphasis supplied).

Northern Pacific Railway Co. v. Dept. of Public Works, 268 U. S. 39, 44-45.

See also:

West v. C. & P. Telephone Company, 295 U. S. 662, 676;

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 107-110;

Morgan v. United States, 298 U. S. 468, 480;

Estep v. United States, 327 U. S. 114, 122-123;

Report of Attorney General's Committee on Administrative Procedures (1941), p. 88.

Moreover, as the court below initially found, the agency failed to make an ultimate finding on an issue which the law required it to make in order to protect the property rights of petitioner, and this failure to make a determination as required was patently arbitrary in view of the uncontradicted evidence found by the agency (App. A,

pp. 11, 12). Clearly, a determination by an administrative agency, arbitrarily reached without support by express findings of basic, essential or jurisdictional facts conditioning its power, cannot be sustained since they are made in excess of statutory and constitutional powers.

Florida v. United States, 282 U. S. 194, 214-215;

United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499, 504;

Mahler vs Eby, 264 U. S. 32, 42-45.

See also:

Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 196-197;

Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80, 94.

In relation to a requirement of findings this Court stated in *Interstate Circuit v. United States,* 304 U. S. 55, at p. 56:

> "The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents . . ."

As further stated by this Court in *Kelly v. Everglades Drainage Dist.,* 319 U. S. 415, 420: "To support such determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated."

Further, the Court of Appeals also should have taken jurisdiction on the basis of the Tax Court's refusal to apply the only method for computing relief under section 722(b)(4) established by its own decisions.

The method referred to is that of "backcasting." Among cases in which the Tax Court has applied it are: (1) *Copco Steel and Engineering Company* (1958), 31 T. C. ....., No. 68; (2) *Lansburgh & Bros.* (1958), 30 T. C. ....., No. 118; (3) *Tankport Terminals, Inc.* (1957), 28 T. C. 736; (4) *Davenport Hosiery* (1957), 28 T. C. 201; and (5) *R. J. M. Company* (1955), 24 T. C. 1032.

The Tax Court has applied no other method. Nor has the Commissioner. Thus the Excess Profits Tax Council, the unit in the Commissioner's office which makes final determinations for him under section 722 (Mim. 6044, 1946-2 C. B. 97), states, E. P. C. 31, 1948-1 C. B. 93:

> "In the case of a taxpayer entitled to the push-back rule under Section 722(b)(4), the constructive level of earnings attained at the end of 1939 should be backcast over the entire base period. . . . It is for this reason that a constructive level of earnings as of December 31, 1939, has been established under the pushback rule as the first step in reconstruction. The second step requires backcasting over the entire base period on the constructive level thus ascertained."

In spite of this standard practice of both the Tax Court and the Commissioner of using backcasting as the method, and the only method, of reconstruction in all cases of this type, in the case at bar the Tax Court rejected this method without reason and without suggestion of any alternative. The Tax Court, in its second opinion, simply charged that the method was "unsuitable."

In relation to such a situation this Court stated, in *Secretary of Agriculture v. United States*, 347 U. S. 645, 652-654, 74 S. Ct. 826, 830-831:

> "But we do say that while the Commission has adumbrated the reasons that commended these charges to its approval, the Commission has not adequately explained its departure from prior norms . . . . We do not know whether the Commission has disregarded its own findings . . . or whether the Commission for a reason not made explicit, has here deemed irrelevant the prevailing rule of its prior cases . . ."

It follows that the issue squarely presented here is whether, despite the requirements of the Constitution and the general power of review vested in Courts of Appeal by Congress (26 U. S. C. 7482(a)), the court below lacked jurisdiction to review petitioner's claims of due process violations because of 26 U. S. C. 1952 ed., section 732(c).

3. Whether Congress by the enactment of Section 732(c) intended to preclude judicial review of the aforesaid constitutional issues is the initial important question here presented.

Clearly, if Congress did not intend such restrictions on judicial power, the abdication of the court below was manifestly erroneous.

Wong Yang Sung v. McGrath, 339 U. S. 33.

There are no express provisions in section 732(c) precluding judicial review of claims of unconstitutionality in the exercise of administrative powers. On the contrary, the area of nonreviewability is narrowly limited. Thus only if the determination of any question is necessary "solely by reason of" section 722, then only the determination of "such question" shall not be judicially reviewable.

It would appear to follow that if the determination of any issue is not necessary "solely by reason" of section 722, then judicial review normally available under 26 U. S. C. 7482(a) remains unimpaired.[5]

This appears to have been the intent of Congress. H. Report No. 146, 77th Cong., 1st Sess., pp. 14-15 (1941-1 C. B. 550, 560-561), and S. Report No. 75, 77th Cong., 1st Sess., pp. 15-16 (1941-1 C. B. 564). Discussing specifically the review provisions of 732(c), the legislative committee gave one example where the determination of the Commissioner "is reviewable only by the Board," and two examples where "review is not confined to the Board." The test for reviewability, the committee explained, is that the question involved "is not one arising solely by reason of the abnormality provisions but *independently of them*" and hence review in such cases is not confined to the agency and "may be reviewed by the courts upon appeal from the decision of the Board." According to the committee report, if a claim for refund involving an issue of abnormality is disallowed, the taxpayer "has the right to sue in the courts upon *any issue* raised in such claim except the issue with respect to abnormalities."[6]

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[5]Section 722 of I. R. C. 1939 was designed as a relief section; its success or failure depends upon its "intelligent and sympathetic administration." H. Report No. 146, 77th Cong., 1st Sess., 1941-1 C. B. 550, 551; Bulletin on Section 722, U. S. Treasury Department, p. 10, quoting H. Report No. 2333, 77th Cong., 1st Sess., 1942-2 C. B. 372, 390. A relief provision must be given a rational and liberal construction in order that it may give the relief it was intended to provide. *Bonwit Teller & Co. v. United States* (1931), 283 U. S. 258, 263; *Helvering v. Bliss* (1934), 293 U. S. 144, 151. And insofar as relief is arbitrarily denied, the effect is to deprive the taxpayer of his property without due process of law. See, *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 351; *Dismuke v. United States*, 297 U. S. 167, 171-173.

[6]For the Court's convenience, we have annexed hereto as Appendix E, a copy of the House Committee Report insofar as it dealt with Section 732(c).

The determination of the questions of arbitrary, capricious and unconstitutional action by the agency officials herein—the making of findings arbitrarily, the failure to make required findings, and the disregard of their own findings—was not necessary "solely by reason of" Section 722. It was not the "correctness" of a decision under section 722 which was here involved; it was the failure to observe the requirements of procedural due process in reaching the decision which was essentially involved. This issue was "independent of" section 722, and clearly intended by Congress to be reviewable by the Courts.[7]

Nor will the courts presume by implication that Congress intended to cut off review of such constitutional questions as are involved herein. As we have indicated above, the legislative history of 732(c) is opposed to such presumption.

Moreover, Congress has uniformly indicated a purpose to retain judicial review of arbitrary, capricious and unconstitutional administrative action wherever the courts have suggested that review might be more limited. See, for example, the reasons for the enactment of 26 U. S. C. 7482(a) (I. R. C. 1939, sec. 1141) following this Court's decision in *Dobson v. Commissioner,* 320 U. S. 489, H. Rep. No. 1, 69th Cong., 1st Sess., pp. 19-20: ". . . The court upon review may consider, for example, questions

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[7]Moreover, Section 732(c) provides that only a "determination" of the said limited character shall not be reviewed. The action of the Tax Court here was not a "determination." As stated in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123 (1951), at p. 136:

> "An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination.' It is implicit in a government of laws and not of men."

as to . . . the constitutionality of the proced[illegible]used, failure to observe the procedure required by la[illegible]." See also, the enactment of 41 U. S. C. Section 321 (Supp. II, 1955) following the decision of this Court in *United States v. Wunderlich*, 342 U. S. 98, H. R. Rep. No. 1380, 83rd Cong., 2d Sess. 4 (1954). The purpose of the law, the House Committee stated, "is to restore the standards of review based on arbitrariness and capriciousness."

It would be, therefore, wholly unfounded, it is respectfully submitted, to presume that Congress by the enactment of 732(c) intended to deny judicial review of the issues here presented. Whatever may be the exact boundary line of the constitutionally required judicial control of administrative action, it appears certain that a serious constitutional question would be raised if Congress sought to make the acts of an administrative body final and conclusive so as to preclude judicial review on the question whether constitutional rights have been infringed. This would appear to be a sheer denial of due process. See, for example, *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 52. This Court will not attribute to Congress an intent to defy the Fifth Amendment or "even to come so near to doing so as to raise a serious question of constitutional law."

Anniston Manufacturing Co. v. Davis, 301 U. S. 337, 351-352.

It is submitted, therefore, on this aspect of the case that Section 732(c), neither expressly nor impliedly, was intended to preclude judicial review of procedural due process violations in "abnormality" proceedings before the Tax Court, and that such issues are subject to review in the courts by force of law (26 U. S. C. 7482(a)) and by force of the Constitution.

4. If Congress be deemed by the enactment of Section 732(c) to have withdrawn concededly arbitrary, capricious and illegal acts of administrative officials from judicial cognizance, then the law, so construed, is contrary to the Constitution.

Congress is without authority to divest the courts of powers that have been vested in them by pertinent provisions of the Constitution. "The judicial power of the United States" is vested in the courts created under Article III and may not be vested elsewhere.[8]

If it is the function of the courts to maintain the Constitution as the supreme law of the land, then the courts cannot be divested of their inherent authority to examine the claims of due process violations wherever such claims are brought before them. Only in this way can there be assurance of a government of laws, not of men—"a check against excess of power and abusive exercise of power in derogation of private right" *Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 76. "The primary check upon arbitrary or unreasonable agency action has been, and in our system of law will continue to be, the judiciary." *Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Service and Procedure* (1955), p. 214.

The ruling of the court below, abdicating its jurisdiction, appears to be contrary to a long line of applicable decisions by this Court. Whatever may be the limits of review under statutes terming administrative action "final" or "nonreviewable," the judicial doors have always been

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[8]As shown in footnote 1, page 3, above, the Tax Court is only an independent agency in the executive branch of the Government, and is not a court at all.

open to the consideration of constitutional issues in such cases, including the constitutionality of cutting off review of constitutional issues.

Thus, it has been stated:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality."
>
> *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 84.

The difference in security of liberty and property, "of judicial over administrative action," was adverted to by this Court in *Nung Fung Ho. v. White*, 259 U. S. 276, 284, and reaffirmed in *Estep v. United States*, 327 U. S. 114, 120. In *Estep*, despite the statute which made decisions of the local draft boards "final," this Court nevertheless held that judicial review existed to determine whether there was any "basis in fact" for a draft classification. "Judicial review may indeed be required by the Constitution" (*supra*, p. 120).

In *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, at p. 161, Mr. Justice Frankfurter stated:

> "Fairness of procedure is 'due process in the primary sense.' Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 681. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution."

In *Wong Yang Sung v. McGrath*, 339 U. S. 33, 49-50, this Court stated:

> "The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body . . . In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used will bring them into harmony with the Constitution."

In *Monongahela Bridge Co. v. Untied States*, 216 U. S. 177, 195, this Court admonished

> "that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

In *Jones v. Securities & Exchange Commission*, 298 U. S. 1, 24, 27, this Court stated:

> "Arbitrary power and the rule of the Constitution cannot both exist . . . if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guarantees . . . The philosophy that constitutional

limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government."

In the light of the aforesaid, the judicial power has always been exercised with respect to an otherwise unreviewable discretion of an administrative agency where the action has been an exercise of power so arbitrary or unreasonable as to disregard the fundamental requirements of due process.

See also:

Hormon v. Brucker, 355 U. S. 579, 581-582;

Youngstown v. Sheet & Tube Co., 343 U. S. 579, 646;

Wieman v. Updegraff, 344 U. S. 183, 192;

Public Service Commission v. Havemeyer, 296 U. S. 506, 515;

Chicago, R. I. & P. Ry. Co. v. United States, 284 U. S. 80, 96-100;

United States v. Williams, 278 U. S. 255, 257-258;

American Power & Light Co. v. Securities & Exchange Commission, 329 U. S. 90, 108;

Nectow v. City of Cambridge, 277 U. S. 183, 187-188;

Ma-King Products Co. v. Blair, 271 U. S. 479, 483;

Myles Salt Co., v. Board of Commissioners, 239 U. S. 478, 481-485;

Martin v. Hunter's Lessee, 1 (Wheat.) U. S. 304, 328;

Marbury v. Madison, 1 (Cranch.) U. S. 137.

Thus, as Mr. Chief Justice Hughes stated in *St. Joseph Stock Yards Co., supra*, at p. 52:

> "The principle [of judicial review] applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

When the court below held initially here that the agency officials had acted arbitrarily and capriciously in violation of the due process provisions of the Constitution, its jurisdiction to review such unlawful action was plain and necessary, and it was contrary to the fundamental law for the court below to thereafter reverse its position and hold that Congress had precluded, or could preclude, such review by the enactment of Section 732(c).[9] That subsequent ruling, it is respectfully submitted, raises questions of constitutional importance which this Court should decide.

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[9]The court below seems to have changed its position because of some recent decisions in other courts denying review under Section 732(c). Those cases, however, present no claims of arbitrary action in violation of the due process provisions of the Constitution, nor a positive finding by the courts that such claim was substantial and well-founded as was decided herein in the initial opinion of the court below. Moreover, even those decisions recognize that review may be had whe independent principles "of general law or equity" are brought into question (*Standard Hosiery Mills v. Commissioner*, 249 F. 2d 469, 471 (C. A. 4, 1957); *Bradford Machine Tool Co. v. Commissioner*, 260 F. 2d 950, 951 (C. A. 6, 1958). Moreover, that constitutional questions may be reviewed despite 732(c) was specifically recognized by the court in *Standard Hosiery Mills, supra*, at p. 471, when it specifically distinguished its decision from the first decision of the court below.

5. The decision of the Court of Appeals on the second appeal holding that its decision on the first appeal that it did have jurisdiction was not binding as the law of the case is in conflict with decisions of other courts of appeals, with decisions of this Court, and with the well established general law on the question.

The rule is well stated in *Gore v. Bingaman* (1942), 20 Cal. 2d 118, 121, 124 P. 2d 17, 19, as follows:

> "Where a question of law once determined is sought to be relitigated upon a second appeal to the same appellate court it is clearly established that the first determination is the law of the case and will not be re-examined in the absence of unusual circumstances leading to injustice or unfairness even though the issue sought to be raised involves the jurisdiction of the court on the prior appeals."

In full support of the rule are the following cases of United States courts of appeals:

Federal Reserve Bank v. Omaha National Bank (C. A. 8), 45 F. 2d 511, 514, citing among other cases;

Thompson v. Maxwell, 168 U. S. 451, 18 S. Ct. 121;

Speh v. Bullard (C. A. 5), 90 F. 2d 227, 228.

and the following decisions of this court:

Whyte v. Gibbes, (20 How.) 61 U. S. 541, 15 L. Ed. 1016;

Tyler v. Maguire, (17 Wall.) 84 U. S. 253, 283, 21 L. Ed. 576;

Noonan v. Bradley, (12 Wall.) 79 U. S. 121, 20 L. Ed. 279.

In both the *Thompson* and *Speh* cases the question involved which was decided on the first appeal was the *jurisdiction of the court.*

That rule is also general and long and throughly established. The quotation above from the *Gore* case is followed by the following citations:

Clary v. Hoagland, 6 Cal. 685, 688;

Scrimsher v. Reliance Rock Co., 1 Cal. App. 2d 382, 393, 36 P. 2d 688;

Washington Bridge Co. v. Stewart, 44 U. S. 413, 424;

Lincoln Joint Stock Land Bank v. Brown, 278 N. W. 294;

Farmers' Bank & Trust Co. v. Stanley, 228 S. W. 691;

Grand Cent. Mining Co. v. Mammoth Mining Co., 104 Pac. 573 (Ann. Cas. 1912A, 254);

3 Am. Jur. 552;

5 C. J. S. 1290;

Black, Law of Judicial Precedents, p. 278.

And at 5B C. J. S. (1958) 215, where the *Gore* case is cited, cases in numerous other jurisdictions are also cited, with no case showing dissent. The rule is shown to apply even though the decision involved conflicts with later cases, 5B C. J. S. 573, or with cases in other jurisdictions, 5B C. J. S. 197. It is also immaterial whether the decision is that of an intermediate appellate court or of the highest court in the jurisdiction. 5B C. J. S. 573. To the same effect see 14 Cyclopedia of Federal Procedure, Third Edition, sec. 67-12, note 21, sec. 69.25, and sec. 69.32.

The question is obviously one of equity. As the record shows, the case at bar has been in the courts now for

more than eight years [R. 3, 24]. Respondent could well have brought the issue of jurisdiction to this court after the first decision by the Court of Appeals, by a petition for a writ of certiorari to that court. Indeed, this Court has held that that is the appropriate remedy.

> *Aspen Mining & Smelting Co. v. Billings,* 150 U. S. 31, 37, 14 S. Ct. 4, 6.

The injustice which has been dealt petitioner by allowing it to be sent back to the Tax Court and then up again to the Court of Appeals only to be told then that that court had no jurisdiction in the beginning, surely ought not to be permitted by this Court. Indeed, the opposite is the law. Before the bar of the law of the case can be removed a party, it has been well established, must show inequity resulting from its application.

> *Hook v. Hook & Ackerman, Inc.* (C. A. 3), 233 F. 2d 180, 183, cert. den., 352 U. S. 960, 77 S. Ct. 350, citing on that point *White v. Higgins* (C. A. 1) 116 F. 2d 312, the case relied on by the court below.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: April 27, 1959.

Respectfully submitted,

GEORGE T. ALTMAN,

Counsel for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit on First Appeal.

United States Court of Appeals for the Ninth Circuit.

Helms Bakeries, Petitioner, vs. Commissioner of Internal Revenue, Respondent. No. 14,808. Aug. 14, 1956.

Petition to Review a Decision of The Tax Court of the United States.

Before: ORR and CHAMBERS, Circuit Judges, and JERTBERG, District Judge.

JERTBERG, District Judge:

This proceeding involves determination of Federal Excess Profits Taxes for the calendar years 1943, 1944 and 1945.

The petitioner, Helms Bakeries (hereinafter referred to as the petitioner) is a California corporation. It filed its tax returns, including its excess profits tax returns, for the years 1940-1945 with the Collector of Internal Revenue for the Sixth District of California.

The only issues presented to the Tax Court for decision related exclusively to the petitioner's right to relief under Section 722 of the Internal Revenue Code of 1939 for the taxable years 1943, 1944 and 1945. The taxpayer was in existence during the entire base period —1936 through 1939—and was entitled to use an excess profits credit based on income under the provisions of Section 713 of the code.

The pertinent sections before this court are Section 722(b)(2) and Section 722(b)(4).

Section 722(a) reads: "In any case in which a taxpayer establishes that the tax computed under this sub-

chapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * *"

Under section 722(b)(2) relief is allowed if "the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer, or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry."

Under section 722(b)(4) relief is allowed if "the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * *" It is also provided under that section that "if the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. * * *" The term "change in the character of the business" is defined in the section to include "a difference in the capacity for production or operation."

Specifically, before the Tax Court, the petitioner ascribed error to the Commissioner of Internal Revenue and rested its claim to the right to Section 722 relief for the taxable years in question, upon two grounds: (1) That its base period earnings were depressed by reason of a price war within the purview of Section 722(b)(2); and (2) That it had increased its capacity for production and operation within the purview of Section 722(b)(4).

After the trial on the merits before the Tax Court, that Court handed down its findings of fact and opinion holding that petitioner was not entitled to any relief under Section 722(b)(2) or under Section 722(b)(4), and thereafter entered its decision in favor of the Commissioner. The opinion of the Tax Court bore a notation at the end reading as follows: "Reviewed by the Special Division". The Tax Court then entered its decision in the case as above indicated. Petitioner filed a motion to amend the findings of fact, which motion was denied. Thereafter petitioner filed a motion to vacate the decision of the Tax Court, and for reconsideration, and that motion was subsequently set for hearing before the Tax Court, and after hearing and submission of memoranda, the motion was denied.

The questions presented for review by this Court, as stated by petitioner, are:

(1) "Whether in computing relief from excess profits taxes, under Section 722(b)(2), I. R. C. 1939, computation of the constructive average base period net income on a basis which recognizes and makes allowance for the fact that the taxpayer was a growing corporation may be denied because computation under a formula which also recognizes and makes allowance for the fact of growth is permitted under Section 713(f) of that code.

(2) Whether the Tax Court denied petitioner due process of law in:

(a) Substituting its arbitrary and capricious judgment—in the form of an ultimate finding 'that lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales'—for the judgment of petitioner's president and general manager where:

(1) Said president and general manager, as found by the court, considered that there was an available market for the goods to be produced by the additional productive capacity;

(2) Said president and general manager, as found by the court, was an experienced executive in the bakery industry whom it regarded as aggressive and foresighted; and

(3) There is a complete absence of any other finding on this point.

(b) Making the arbitrary distinction between a change in capacity which 'caused', and one which 'permitted', expansion and growth.

(c) Failing to make an ultimate finding or other determination of fact on the issue of change in capacity for operation, adequate data for computation thereof being contained in the evidentiary findings.

(d) Failing to apply to petitioner the principle of 'backcast' of income from 1939, the basis of growth being indirectly given effect through such back-cast principle, although it applied that principle in cases involving other taxpayers.

(3) Whether the Tax Court properly and fully carried out the review by a special division required by Section 732(d), I. R. C. 1939, although (a) that court promulgated no rules of any kind under that section, (b) taxpayers were never informed of their rights and procedures, if any, in respect of such review, (c) the record contains nothing in respect of such review except the sole and simple fact that the findings and opinion had been reviewed by the special division, and (d) petitioner's motion to vacate and for reconsideration was denied by the Tax Court without consideration by the special division.

(4) Whether this Court has jurisdiction to review the determination of the Tax Court to the extent to which the above questions are involved."

Petitioner does not challenge the findings of fact of the Tax Court, except the findings contained in the last two paragraphs thereof, which read as follows:

"Lack of productive capacity was not a factor which to any appreciable extent lmited petitioner's sales.

The excess profits tax pay by petitioner for the years in issue was not excessive and discriminatory. Petitioner was not entitled to a constructive average base period net income which was large enough to produce a credit greater than the credit received under Section 713 of the 1939 Code."

Respondent concedes that this Court has jurisdiction to review the questions presented as to whether the petitioner has been accorded a review by the Special Division of the Tax Court in keeping with Section 732(d), but contends that this Court should decline to take jurisdiction of the petition for review in so far as it relates to

all other matters attempted to be presented to this Court, namely, the points made with respect to the decision of the Tax Court as to the petitioner's right to relief under the provisions of Section 722(b)(2) and Section 722(b)(4) because of the prohibition contained in Section 732(c).

We will first consider petitioner's contentions in respect to Section 732(d). This section provides: "The determinations and redeterminations by any division of the Tax Court involving any question arising under Section 721(a)(2)(c) or Section 722 shall be reviewed by a special division of the Tax Court which shall be constituted by the Presiding Judge and consist of not less than three members of the Tax Court. *The decisions of such* special division shall not be reviewable by the Tax Court and shall be deemed decisions of the Tax Court."

The petitioner's contentions on this subject are summarized under paragraph 3 of its "Statements of Questions Presented for Review" *supra.*

The petitioner has misinterpreted the function of the "Special Division". The review by the Special Division required by Section 732(d) is not intended to be similar to a review by an Appellate Court with the usual opportunity to submit briefs and to make oral arguments. Because of the complexities of the relief provisions of the Excess Profits Tax law, Congress provided for Special Divisions within the Tax Court for the purpose of reviewing decisions involving these abnormalities provisions. These Special Divisions were composed not only of experts in tax law, but of experts who were to keep abreast of legislation and construction of questions of law arising under these abnormalities provisions. When a Judge of the Tax Court is assigned to hear and decide

a case which involves these abnormalities sections, his opinion is automatically reviewed by the Special Division assigned to review the particular section involved. This review within the Tax Court itself was discussed in Green Springs Dairy v. Commissioner, 208 Federal 2d 471, where the Court said that the purpose of Congress in enacting section 732(d) was not "to secure a re-argument of the case, but to secure a consistent and uniform application of the principles of the Excess Profits Tax statue by a group familiar with the provisions involved."

The fact that the petitioner's motions to amend the findings and for reconsideration were denied by the Division, whose decision was approved by the "Special Division" does not establish that the function of the "Special Division" was usurped. In denying such motions, the Division simply refused to disturb the decision which the "Special Division" had already approved. We hold that the petitioner was not denied due process of law because it was not given an opportunity to appear, argue, or submit briefs before the "Special Division".

The next point for consideration is whether or not this Court should decline jurisdiction because of the provisions of Section 732(c). This section provides: "If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court."

Petitioner contends that the determination of all remaining questions presented by it for review is not made necessary "solely by reason of Section 722" and hence

the provisions of Section 732(c) do not prohibit review by this Court.

Petitioner argues: (1) That the question presented under paragraph 1 of its "Statement of Questions on Appeal" (*supra*) involve the application and effect of Section 713(f); (2) That the questions presented under paragraph 2, in all of its parts, involve the denial to petitioner of due process under the Fifth Amendment to the Constitution of the United States, and that as to part "d" thereof, there is also involved the duty of the Tax Court under Section 1117 of the 1939 Code. We will consider these points *ad seriatim.*

Under point 1, petitioner states that the Tax Court erroneously disregarded petitioner's growth because an adjustment for growth had been allowed petitioner under Section 713(f). On this issue the Tax Court found that "The Excess Profits Tax paid by petitioner for the years in issue was not excessive and discriminatory. Petitioner was not entitled to a constructive average base net income which was large enough to produce a credit greater than the credit received under Section 713 of the 1939 Code." We do not construe the decision of the Tax Court in denying relief that it expressly or impliedly held, based on the foregoing finding, that the petitioner was precluded from receiving any relief under Section 722(b)(2), because it had received the benefit of Section 713(f). We construe the finding to mean simply that under the facts presented to the Tax Court, the petitioner failed to establish that any relief which the Tax Court could give under Section 722(b)(2) would result in a credit greater than the petitioner had already received under Section 713(f). We therefore hold that the determination of the question presented under this heading is made necessary

solely by reason of Section 722(b)(2), and that, therefore, under Section 732(c), this Court is without jurisdiction to pass upon that issue.

Under point (2) above, petitioner argues that the decision of the Tax Court was arbitrary and capricious, contrary to the facts found by the Tax Court, and that the Tax Court failed to make a finding on a material issue presented to it.

Petitioner sought relief under Section 722(b)(4) "upon the basis of a change in its capacity for operation and production occurring within the base period." The Tax Court found that "During the base period there was a change in the productive capacity of the petitioner. Lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales." There is no finding by the Tax Court on the issue of a change in the petitioner's capacity for operation occurring within the base period.

With respect to the change in petitioner's capacity for production occurring within the base period, the Court found that there was a change in the productive capacity of the petitioner's business during the base period; that the President and General Manager of petitioner was an experienced executive in the bakery industry prior to petitioner's organization in 1931; that during the period 1931 to 1939 petitioner made nine additions to its plant; that on December 15, 1931, petitioner completed the installation of its first traveling oven; that on April 9, 1934, petitioner completed the installation of its second traveling oven; that the installation of a third traveling oven was completed on June 3, 1937; at that time, space was provided for the eventual installation of a fourth oven, and the electrical wiring, fixtures, plumbing

and other connections were installed; that petitioner was financially unable to install a fourth traveling oven in 1937, even though its management considered that there was an available market for such additional production; that on December 5, 1939, petitioner completed the installation of its fourth and largest traveling oven; that during the base period the baking area of petitioner's traveling ovens increased from 1,260 square feet to 2,688 square feet; that during the same period petitioner acquired additional bread and cake machinery, bread and cake tools, and bread and cake fixtures for use with its increased baking capacity; that petitioner in 1937 spent $10,000 for electrical wiring and other connections for the additional oven, but could not install the oven then because of financial limitations.

On this phase of the case the Tax Court relied on Green Spring Dairy, Inc., 18 TC 217 which the Tax Court stated "is strikingly similar to the case at bar * * *". The following quotation from the Green Spring case omitted from the opinion of the Tax Court in the instant case makes that case a poor reed on which to rely. The omitted quotation is as follows:

"While petitioner experienced difficulty with its facilities toward the end of 1935, the difficulty lay in its distribution and storage facilities and not in its production facilities; moreover, corrective measures were taken before the end of 1935 to increase distribution and storage capacity through the opening of a branch station. Although there was undoubtedly a certain amount of congestion in petitioner's plant, we are satisfied that it had not yet reached the limit of its capacity, and that its sales or acquisition of new customers was not in any way impeded. Throughout these years petitioner's operation

and management were in the hands of tried and capable businessmen, *who had the resources to construct a new plant earlier if it had been necessary, and we are unable to conclude that they did not act in time.*" (Italics ours.)

In the instant case the Tax Court found that the petitioner could not install the additional oven because of financial difficulties which finding is directly contrary to the statement in the Green Spring Dairy case in which it was stated that the taxpayer there had the resources to construct a new plant earlier if it had been necessary. Under a fair construction of the finding of the Tax Court there was an available market in 1937 for additional production.

In view of the evidentiary findings of the Tax Court on this subject, its conclusion "lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales" appears to be arbitrary and contrary to its own findings.

As above stated, the Tax Court failed to make a finding on the issue of a change in petitioner's capacity for operation (as distinguished from capacity for production) occurring within the base period. As above noted, petitioner sought relief upon the basis of a change in its capacity for operation *and* production. It would be a rare instance where productive capacity alone would produce income. In all but the most rare instances there must not only exist productive capacity, but also a market must be found or developed, in order to produce income. The Tax Court found that petitioner added in 1939, twenty-six franchise routes and five coach routes, which included in 1939 extensions to Ventura, Santa Barbara and San Diego counties; that petitioner always installed ovens in anticipation of further development of

its markets; that to avoid offering stale goods to customers, it was petitioner's policy to get the oven capacity ready, and then develop the market, i.e., the routes; that during the period of July 1, 1939 to March 1, 1940, petitioner spent approximately $50,000.00 for suburban loading rooms, and $79,000.00 for trucks, trailers, coaches and franchise cars, and that petitioner was committed to its 1939-1940 expansion program prior to December 31, 1939. The Tax Court should have made a finding as to whether or not, if this increase in capacity for operation had been made two years earlier, a higher level of earnings would have been reached at the end of the base period, and, if so, the amount thereof.

In light of the foregoing record in respect to relief sought by the petitioner under Section 722(b)(4), we are not precluded from assuming jurisdiction because of the provisions of Section 732(c).

Accordingly, the petition for review is dismissed for lack of jurisdiction in respect to the relief sought by petitioner under Section 722(b)(2) and remanded to the Tax Court for further consideration of the relief sought by petitioner under Section 722(b)(4).

(Endorsed:) Opinion. Filed, Aug. 14, 1956,

Paul P. O'Brien, Clerk.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit on Second Appeal.

United States Court of Appeals for the Ninth Circuit.

Helms Bakeries, Petitioner, vs. Commissioner of Internal Revenue, Respondent. No. 15,574. Feb. 3, 1959.

Petition to Review a Decision of the Tax Court of the United States.

Before: Orr, Chambers and Jertberg.

Jertberg, Circuit Judge:

This is a second appeal in a case involving determination of federal excess profits taxes for the calendar years 1943, 1944 and 1945. The decision of this Court on the first appeal appears in 236 F. 2d, page 3.

The issues presented to the Tax Court, whose decision was reviewed on the first appeal, related exclusively to the petitioner's right to relief under section 722 of the Internal Revenue Code of 1939[1] for the calendar years above stated. Petitioner was in existence during the entire base period—1936 to 1939 inclusive—and was entitled to use an excess profits credit based on income under the provisions of section 713 of the Code. The pertinent sections

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[1]Sec. 722(a) reads: "In any case in which a taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used for a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * *"

before the Court were 722(b)(2)[2] and section 722(b)(4).[3] Specifically, the petitioner rested its claim to the right to section 722 relief for the taxable years upon two grounds: (1) that its base period earnings were depressed, by reason of a price war within the purview of section 722(b)(2); and (2) that it had increased its capacity for production and operation within the purview of section 722(b)(4). After trial, the Tax Court held that petitioner was not entitled to any relief under section 722(b)(2) or section 722(b)(4). 23 T. C. 967. This Court held on the first appeal that because of the provisions of section 732(c) of the Code[4] that it was without jurisdiction to pass upon the issue of relief claimed under section 722(b)(2) and dismissed for lack of jurisdiction the petition for review insofar as it related to that issue.

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[2]Under section 722(b)(2) relief is allowed if "the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer, or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry."

[3]Under section 722(b)(4) relief is allowed if "the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * *" It is also provided under that section that "if the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. * * *" The term "change in the character of the business" is defined in the section to include "a difference in the capacity for production or operation."

[4]Section 732(c) provides: "If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court."

The petitioner sought relief under section 722(b)(4) upon the basis of a change in its capacity for operation and production occurring within the base period. The Tax Court found that "During the base period there was a change in the productive capacity of the petitioner. Lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales." The Tax Court made no finding on the issue of a change in the petitioner's capacity for operation occurring within the base period.

We held that under a fair construction of the finding of the Tax Court there was an available market in 1937 for additional production, and that in view of the evidentiary finding of the Tax Court on this subject its conclusion "Lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales" was arbitrary and contrary to its own finding. We further stated that the Tax Court should have made a finding as to whether or not, if this increase in capacity for production had been made two years earlier, a higher level of earnings would have been reached at the end of the base period, and, if so, the amount thereof. The judgment of this Court on the remand became final, and the Comissioner did not seek review of our decision by petition for certiorari. The Tax Court rendered a new opinion, 28 T. C. 79, which was reviewed by the special division of the Tax Court, which concluded with the following statement: "Upon reconsideration of the same factors and the entire record, we are convinced and find that its reconstructed average base period net income would not exceed that which respondent has accorded it under section 713(f) of the Internal Revenue Code of 1939." Pursuant to that opinion the Tax Court rendered its decision that there are

no refunds of excess profits taxes due to the petitioner for the tax years 1943, 1944 and 1945 under the provisions of section 722, Internal Revenue Code of 1939.

The Commissioner contended on the first appeal that this Court was without jurisdiction to entertain the first appeal because of the prohibition contained in section 732(c), and as construed in James F. Waters, Inc. vs. Commissioner of Internal Revenue, 160 F. 2d 596 (C. A. 9th), certiorari denied 332 U. S. 767; Corn Products Refining Co. vs. Commissioner of Internal Revenue, 215 F. 2d 513 (C. A. 2d), certiorari denied 348 U. S. 911; Colonial Amusement Co. of Philadelphia vs. Commissioner of Internal Revenue, 173 F. 2d 568 (C. A. 3d); Colorado Milling & Elevator Co. vs. Commissioner of Internal Revenue, 205 F. 2d 551 (C. A. 10th); George Kemp Real Estate Co. vs. Commissioner of Internal Revenue, 182 F. 2d 847 (C. A. 2d), certiorari denied 340 U. S. 852; A. B. Frank Co. vs. Commissioner of Internal Revenue, 211 F. 2d 497 (C. A. 5th).

The Commissioner recognizes that the "law of the case" rule would normally preclude reconsideration on this appeal of the determination made by this Court on the first appeal that this Court was not precluded by section 732(c) from assuming jurisdiction to pass upon the issue of relief claimed under section 722(b)(4). Nevertheless, the Commissioner urges us to reconsider and reexamine our prior holding on this point.

Since our decision on the first appeal the general question before us has been considered by other circuits. Standard Hosiery Mills, Inc. vs. Commissioner of Internal Revenue, 249 F. 2d 469 (C. A. 4th); The Crowell-Collier Publishing Co. vs. Commissioner of Internal Revenue, 259 F. 2d 860 (C. A. 2d), certiorari denied January 12,

1959; Brown Paper Mill Co. vs. Commissioner of Internal Revenue, 255 F. 2d 77 (C. A. 5th), certiorari denied December 8, 1958; The Patent Button Co. of Tennessee vs. Commissioner of Internal Revenue, 256 F. 2d 726; Bradford Machine Tool Co. vs. Commissioner of Internal Revenue, 260 F. 2d 950 (C. A. 6th).

We have carefully reexamined the record in this case, and have reviewed our decision on the first appeal in the light of decisions cited counsel before and after the submission of this cau . have reached the conclusion that we were in error in assuming jurisdiction on the first appeal in respect to petitioner's claim for relief under section 722(b)(4). The "law of the case" rule does not preclude us from overruling our prior decision on being convinced that our prior holding was erroneous. White vs. Higgins, 116 F. 2d 312, and cases cited therein. Our decision on the first appeal, reported in 236 F. 2d 3, is overruled insofar only as it relates to section 722(b)(4) relief. The petition for review on the present appeal is dismissed for lack of jurisdiction.

(Endorsed): Opinion. Filed Feb. 3, 1959.

Paul P. O'Brien, Clerk.

APPENDIX C.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Helms Bakeries, Petitioner, vs. Commissioner of Internal Revenue, Respondent. No. 15,574.

Upon petition to review a decision of the Tax Court of the United States.

This cause came on to be heard on the Transcript of the Record from the Tax Court of the Uited States, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review be, and hereby is dismissed for lack of jurisdiction.

(ENDORSED) Judgment.

Filed and entered: February 3, 1959

PAUL P. O'BRIEN, Clerk

APPENDIX D.

Extracts From the Internal Revenue Code of 1939.

Section 713. EXCESS PROFITS CREDIT—BASED ON INCOME.

(f) AVERAGE BASE PERIOD NET INCOME—INCREASED EARNINGS IN LAST HALF OF BASE PERIOD.—The average base period net income determined under this subsection shall be determined as follows:

(1) By computing, for each of the taxable years of the taxpayer in its base period, the excess profits net income for such year, or the deficit in excess profits net income for such year;

(2) By computing for each half of the base period the aggregate of the excess profits net income for each of the taxable years in such half, reduced, if for one or more of such years there was a deficit in excess profits net income, by the sum of such deficits . . .;

(3) If the amount ascertained under paragraph (2) for the second half is greater than the amount ascertained for the first half, by dividing the difference by two;

(4) By adding the amount ascertained under paragraph (3) to the amount ascertained under paragraph (2) for the second half of the base period;

(5) By dividing the amount found under paragraph (4) by the number of months in the second half of the base period and by multiplying the result by twelve;

(6) The amount ascertained under paragraph (5) shall be the average base period net income determined

under this subsection, except that the average base period net income determined under this subsection shall in no case be greater than the highest excess profits net income for any taxable year in the base period . . .

Section 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) GENERAL RULE.—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that in the cases described in the last sentence of section 722(b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character of its business under section 722(c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) TAXPAYERS USING AVERAGE EARNINGS METHOD. —The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(2) the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry.

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capicity for production or operation, ... Any change in the capacity for production or operation of the business consummated during any taxable year ending after

December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, . . . shall be deemed to be a change on December 31, 1939, in the character of the business. . . .

Section 732. REVIEW OF ABNORMALITIES BY BOARD OF TAX APPEALS [NOW THE TAX COURT OF THE UNITED STATES].

(c) FINALITY OF DETERMINATION.—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.

(d) REVIEW BY SPECIAL DIVISION OF BOARD.—The determinations and redeterminations by any division of the Board involving any question arising under section 721 (a)(2)(C) or section 722 with respect to any taxable year shall be reviewed by a special division of the Board which shall be constituted by the Chairman and consist of not less than three members of the Board. The decisions of such special division shall not be reviewable by the Board, and shall be deemed decisions of the Board.

Section 1100. STATUS.

The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the chief judge and the judges of The Tax Court of the United States.

Section 1117. REPORTS AND DECISIONS.

(a) REQUIREMENT.—A report upon any proceeding instituted before the Board and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board.

(b) INCLUSION OF FINDINGS OF FACT OR OPINIONS IN REPORT.—It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions.

Extracts From the Internal Revenue Code of 1954.

Sec. 7441. Status.

The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court.

Sec. 7482. Courts of Review.

(a) Jurisdiction.—The United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

APPENDIX E.

1941 C.B. 1-2, pp. 560-561:

Section 9. Review of Abnormalities by Board of Tax Appeals.

Section 9 of the bill (adding section 732 to the Excess Profits Tax Act of 1940) extends to the Board exclusive jurisdiction to review the Commissioner's decision upon any question the determination of which is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721 or 722. For example, an item of income of $100,000, the amount of which is not in dispute, is includable in gross income for 1940 and involves a question concededly arising under section 721(a)(2)(A). The Commissioner determines that the item is attributable to 1939 and 1940 in the respective sums of $25,000 and $75,000. Such determination is made upon an issue arising solely under section 721 and, if the taxpayer contests such allocation, the determination of the Commissioner in such case is reviewable only by the Board. If, however, the Commissioner determines, for example, the amount of income derived by a taxpayer from a transaction falling within section 721(a)(2)(E), relating to amounts included in gross income for the taxable year by reason of the termination of a lease of real property, and the amount so determined is contested by the taxpayer, the question as to amount of such income is not one arising solely by reason of the abnormality provisions but independently of them and hence review of the determination as to the amount in such a case is not confined to the Board.

Likewise, review is not confined to the Board if, for example, the Commissioner determines that the taxpayer realized in 1940 income of a character which, if realized

in that year, would fall within section 721(a)(2)(A) but which the taxpayer contends was realized in 1939. In such case the question whether income was so realized in 1940 may be reviewed by the courts upon appeal from the decision of the Board. Assuming in such case that it is ultimately held that the income was realized in 1940, a dispute as to the resulting question of allocation as between years of such item may not be carried beyond the Board.

Under existing law, unless a deficiency has been determined by the Commissioner, a taxpayer has no right of appeal to the Board (section 272(a)(1), I.R.C.). Thus, for example, if a refund claim were filed by a taxpayer and the Commissioner disallowed the claim in whole or in part but did not determine deficiency, no right of review of the Commissioner's action by the Board would be present. Inasmuch as the taxpayer's right to relief under certain of the relief provisions provided in this bill may only be raised by a claim for refund, it is necessary that a procedure be provided whereby the Board may obtain jurisdiction to review a decision by the Commissioner disallowing such claims. Accordingly, section 732 (added to the Excess Profits Tax Act of 1940 by section 9 of the bill) provides that the taxpayer may file a petition with the Board of Tax Appeals within 90 days after notice of such disallowance is mailed for redetermination of the excess-profits tax. If such petition is filed such notice of disallowance is deemed to constitute a notice of deficiency for the purposes of assessments and collection of any deficiencies and the credit or refund of overpayments (including the suspension of the statute of limitations with respect thereto). If such appeal is taken, then all pertinent issues bearing upon the tax liability

under Chapter 2E may be raised by the taxpayer and reviewed by the Board. If the Board does not find an overassessment but finds a deficiency in such cases, such deficiency may be assessed and collected, regardless of any statute of limitations otherwise applicable. If a claim for refund involving an issue of abnormality is disallowed in whole or in part, and the taxpayer does not wish to appeal to the Board, it still has the right to sue in the courts upon any issue raised in such claim except the issue with respect to abnormalities.